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In the

Supreme Court of the United States

October Term, 1995

THE PITTSTON COMPANY and
CLINCHFIELD COAL COMPANY,
Petitioners,

v.

BRUCE BABBITT, Secretary, United States
Department of the Interior,

COMMONWEALTH OF VIRGINIA, Department
of Mines, Minerals & Energy, Division
of Mined Land Reclamation,
Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF OF THE NATIONAL MINING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL MINING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Amicus, National Mining Association ("NMA"), is a trade association whose 365 members include mining companies, mining equipment manufacturers and suppliers, and related businesses that serve the mining industry. NMA's central purpose is to represent the interests of its members in important public policy issues affecting the development and use of mineral resources.

NMA's coal mining members produce most of the nation's coal. As such, Amicus has a special interest in the interpretation of federal laws which regulate the mining of coal, and in assuring that section 526(a)(1) of the Surface Mining Control and Reclamation Act ("SMCRA" or "Surface Mine Act"), 30 U.S.C. § 1276(a)(1),[2] is correctly interpreted to ensure that its members are not wrongfully

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[1] Pursuant to Supreme Court Rule 37.2, Amicus has filed with the Court documents reflecting that the counsel for all parties to this proceeding have consented to the filing of this Brief.

[2] Section 1276(a)(1) provides in pertinent part:

> Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 501, 515, 516, and 523 [30 U.S.C. §§ 1251, 1265, 1266, and 1273] shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located.

precluded or constrained from obtaining judicial relief in a convenient forum. Petitioners, The Pittston Company and its subsidiary Clinchfield Coal Company (together "Pittston"), are not members of NMA. However, interpretation of the judicial review provisions enumerated in section 1276(a)(1), has been the source of enduring dispute and uncertainty, and the issue presented in Petitioners' Petition for a Writ of Certiorari ("Petition") is significant to the coal industry.

This Court was first asked to review the subject matter jurisdiction issue presented in the Petition fourteen years ago. *Watt v. Holmes Limestone Co., cert. denied*, 456 U.S. 995 (1982).[3] Over the objection of two justices the Court declined to accept certiorari. Justice White, writing for the dissenters, correctly predicted that failure to address the issue could result in "substantial disruption both to the coal mining industry and to the agencies charged with administering the Surface Mining Act." *Id.* at 997.

There was no conflict among the circuits at the time this Court declined review of *Holmes Limestone*. This is no

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[3] In *Holmes Limestone*, the Sixth Circuit held that section 1276(a)(1) authorized concurrent jurisdiction in the federal courts to hear challenges to national rules promulgated by the Secretary of the Interior, rejecting the Secretary's assertion that affected parties were required to bring such challenges exclusively in the United States District Court for the District of Columbia. *Holmes Limestone Co. v. Andrus*, 655 F.2d 732, 733 (6th Cir. 1981).

longer the situation.[4] Although this Court did grant certiorari in a subsequent case interpreting section 1276(a)(1) in a manner conflicting with *Holmes Limestone*, that case settled, and certiorari was dismissed. *See Virginia ex rel. Virginia Dep't of Conservation & Economic Dev. v. Watt*, 741 F.2d 37 (4th Cir.), *cert. granted*, 469 U.S. 979 (1984), *cert. dismissed*, 469 U.S. 1198 (1985).

The disparate impact arising from the conflicting interpretations the circuits have given section 1276(a)(1) is substantial, and the prospect of unnecessary threshold litigation over the question of which is the appropriate court persists. For example, an operator mining coal in Ohio or Kentucky may file a direct facial challenge to a rule promulgated by the Secretary of the Interior in local federal district court. In contrast, as demonstrated by the case now before the Court, an operator in neighboring Virginia or West Virginia may stipulate that the facial validity of a rule is not being contested, yet cannot establish jurisdiction in local federal district court to adjudicate whether the application of the rule violates the operator's due process rights.

Importantly, even if the Court should reject the interpretation of section 1276(a)(1) set forth in *Holmes*

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[4] The Petition sets forth the status of the various circuit courts' interpretation of section 1276(a)(1). Petition, 8-9.

Limestone, the factual situation presented in the Petition requires the Court to decide whether the jurisdiction limiting effect of section 1276(a)(1) extends to procedural due process challenges, or other requests for judicial review in which the facial validity of a national rule is not under attack.[5] Granting certiorari in this case would promote certainty and uniformity in the jurisdictional power of the federal courts.

SUMMARY OF ARGUMENT

Congress may invest a particular federal court with exclusive jurisdiction to hear challenges to agency action, but statutory provisions which purport to restrict the availability of judicial review should be read narrowly, not broadly. Congress has demonstrated in numerous statutes a sensitivity to the need to speak clearly when curtailing the venue normally available to a litigant. The absence of any words in section 1276(a)(1) of the Surface Mine Act indicating an intent to restrict venue where a federal court is asked to review actions by the Secretary of Interior promulgating national rules is especially significant, because words demonstrating a clear intent to provide for exclusive jurisdiction are used elsewhere in the Act, including section 1276(a)(1) itself.

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[5] Jurisdictional confusion under section 1276(a)(1) persists even where the issue is one of application of a rule versus the validity of a rule. *See Coteau Properties Co. v. Department of the Interior*, 53 F.3d 1466, 1471 n.6 (8th Cir. 1995).

Even if section 1276(a)(1) may be read to vest exclusive jurisdiction in the District Court for the District of Columbia Circuit to hear challenges to national rules promulgated by the Secretary, the language of section 1276(a)(1) and due process concerns support the conclusion that other federal courts retain jurisdiction to adjudicate cases in which the facial validity of a rule is not under attack.

ARGUMENT

A. Provisions In Federal Statutes Which Purport To Restrict The Availability Of Judicial Review Should Be Narrowly Construed.

30 U.S.C. § 1276(a)(1) states, in pertinent part, that "[a]ny action by the Secretary promulgating national rules or regulations . . . shall be subject to judicial review in the United States District Court for the District of Columbia Circuit." Petitioner has set forth the relevant legislative history of the Surface Mine Act which bears on why the absence of any word of limitation such as "only" or "exclusive" is significant. Petition, 12-13. Amicus will not revisit the legislative history of the Act. However, the general principle that access to judicial review should not be restricted absent a clear Congressional directive merits emphasis.

The Congressional power to ordain and establish inferior courts "includes the power of investing them with jurisdiction either limited, concurrent, or exclusive and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (quotations omitted). Indeed, the Administrative Conference of the United States, which was established by the Legislature to study and make recommendations concerning the adequacy and fairness of administrative procedure,[6] has recognized the principle that jurisdictional provisions "should draw bright lines to minimize the waste and expense of litigation over whether a case has been brought in the right court." 41 Fed. Reg. 56767 (1976).

Congress has demonstrated that it knows how to restrict venue for challenging the validity of a regulation. For instance, the Emergency Price Control Act of 1942[7]

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[6] *See* 5 U.S.C. § 574(1).

[7] 50 U.S.C. § 204(d), in pertinent part, provided:

> The Emergency Court of Appeals, and the Supreme Court ... *shall have exclusive jurisdiction* to determine the validity of any regulation or order issued under section 2 .... Except as provided in this section, *no court, Federal, State, or Territorial, shall have jurisdiction or power* to consider the validity of any such regulation, order, or price schedule ....

Lockerty, 319 U.S. at 186-87 (emphasis added).

vested in the Emergency Court of Appeals and this Court *exclusive jurisdiction* to pass on the validity of commodity price control regulations promulgated by the Price Administrator. Thirty years later in conjunction with construing the breadth of judicial review provisions in the Clean Air Act, Chief Justice (then Associate Justice) Rehnquist noted that "[t]he broad language of [the Emergency Price Control Act] gave *clear evidence of congressional intent* that any actions taken by the Price Administrator under the purported authority of the designated sections of the Act should be challenged *only* in the Emergency Court of Appeals." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 279 (1978) (emphasis added).

In a number of environmental protection statutes Congress has employed plain language evidencing its intent to confer to a single tribunal exclusive venue to review challenges to the validity of agency regulations, including regulations establishing national performance standards. Thus, under Section 7006(a)(1) of the Resource Conservation and Recovery Act -- the 1976 statute regulating the storage, treatment and disposal of hazardous waste -- a petition for review of the EPA's action in promulgating "any regulation, or requirement under this chapter ... may be filed *only* in the United States Court of Appeals for the District of Columbia Circuit...." 42 U.S.C. § 6976(a)(1) (emphasis added).

Section 307(b) of the Clean Air Amendments of 1970 provides that a petition for review of the Administrator's action in promulgating certain national emissions standards "may be filed *only* in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1) (emphasis added). The very next sentence provides that a petition for review of the Administrator's action in approving or promulgating any state implementation plan "may be filed *only* in the United States Court of Appeals for the appropriate circuit." *Id.* (emphasis added). Similarly,

Section 16(a) of the Noise Control Act of 1972 also contains a clear limitation on the venue for reviewing certain agency actions. It provides that a petition for review of the Administrator's action in promulgating certain national emission standards "may be filed *only* in the United States Court of Appeals for the District of Columbia Circuit." 42 U.S.C. § 4915(a) (emphasis added).

As these environmental statutes demonstrate, section 1276(a)(1) of the Surface Mining Act of 1977 was not drafted in a vacuum. Rather, this provision was enacted against the backdrop of a series of environmental protection statutes which used consistent and clear exclusivity language. As these statutes confirm, Congress was accustomed to employing plain exclusivity language when it intended to restrict venue to review agency action.

Numerous provisions in the Surface Mining Act demonstrate that Congress was attentive to the need to draw clear jurisdictional lines. For example, in section 1253(a) Congress expressly conferred *exclusive* jurisdiction over the regulation of surface coal mining and reclamation operations to states promulgating a state regulatory program approved by the Department of the Interior. *See also* 30 U.S.C. § 1254(a) (vesting the Secretary with *exclusive* jurisdiction where a federal plan is promulgated). Sections 1270(c) and (f) provide that challenges brought by citizens to compel compliance with the Surface Mining Act or for damages may be brought "*only* in the judicial district in which the surface coal mining operation complained of is located." (emphasis added).

Thus, it is significant that the relevant sentence in section 1276(a)(1) which provides that "[a]ny action by the Secretary promulgating national rules ... shall be subject to judicial review in the United States District Court for the District of Columbia Circuit" is immediately followed by a sentence which states that any other action constituting rulemaking by the Secretary shall be subject to judicial review "*only* by the United States District Court for the District in which the surface mining operation is located." (emphasis added). Where specific language is included in one section of a statute but omitted in another related section of the same statute, it is generally presumed that disparate inclusion and exclusion was done intentionally and

purposefully. *Russello v. United States*, 464 U.S. 16, 23 (1983). Moreover, as this Court noted in *Russello*, where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment -- as happened with section 1276(a)(1)[8] -- "it may be presumed that the limitation was not intended." *Id.* at 23-24. *See also Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1422, 1429 (D.C. Cir. 1984) (construing the scope of venue restrictions for citizens' suits authorized under section 1270(c) of the Surface Mining Act) ("Although there is no explanation for the adoption of the broader provision, we may not assume that Congress took this action 'for no reason at all'").

The rule that words employed in a statute should not be discarded as being mere surplusage or being meaningless applies with particular force where such terms are included in some sections and excluded in other sections of the same act. *United States v. Lamere*, 980 F.2d 506, 513 (8th Cir. 1992). Where Congress knows how to say something but chooses not to, its silence is controlling. *In re Haas*, 48 F.3d 1153 (11th Cir. 1995) (compiling cases).

The absence of plain language in section 1276(a)(1) restricting jurisdiction to the District Court for the District of Columbia, coupled with a legislative history which does not

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[8] The legislative history of section 1276(a)(1) is summarized in the Petition, 12-13.

reveal clear Congressional intent to restrict jurisdiction, requires a finding of concurrent jurisdiction. Accordingly, this Court should affirm the interpretation of section 1276(a)(1) set forth in *Holmes Limestone*, and reject limitations on judicial review which other circuits have read into section 1276(a)(1).

B. Assuming Section 1276(a)(1) Limits Review Of Any Action By The Secretary Promulgating National Rules To The District Of Columbia, It Does Not Divest Other Federal Courts Of Jurisdiction To Hear Cases That Do Not Challenge The Facial Validity Of A National Rule.

Pittston has not challenged the facial validity of any rule promulgated by the Secretary. Petition, 15. Even if Congress intended that challenges to the Secretary's rules be brought only in the United States District Court for the District Of Columbia, it does not follow that the preclusive effect of section 1276(a)(1) is so complete that any challenge to administrative action taken in accordance with the regulations constitutes an attack on the regulations which can be heard only in that forum. *See Virginia ex rel.*, 741 F. 2d at 40.

Section 1276(a)(1) provides, in pertinent part, that any action by the Secretary "promulgating national rules or

regulations *including standards pursuant to sections 1251, 1265, 1266, and 1273* shall be subject to judicial review in the United States District Court for the District of Columbia Circuit." Each of these enumerated sections pertains to national performance standards.[9] No enumerated section pertains to enforcement provisions (section 1271), or rules for permit approval or denial (section 1260). Since the enumerated sections focus on performance standards, rules of statutory construction caution against an expansive reading of section 1276(a)(1). "[W]here it clearly appears that the lawmakers were thinking of a particular class of ... objects their words of a general description may not have been intended to embrace any other than those within the class...." *Reiche v. Smythe*, 80 U.S. 162 (1872). *See generally, 2A Singer, Sutherland Statutes and Statutory Construction* § 47.16 (5th ed. 1991).

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[9] Section 1251 pertains to "Environmental Protection Standards" during the interim regulatory program. Section 1265 addresses "Environmental Protection Performance Standards" during the permanent regulatory program. Section 1266, "Surface Effect of Underground Coal Mining Operations", sets forth the special environmental performance standards applicable to underground coal mining. Section 1273 pertains to "Federal Lands", and sets forth the requirements for implementing a surface mining program covering federal lands.

Although the referenced sections may not on their face limit the categories of national rules subject to review in the United States District Court for the District of Columbia Circuit, they are relevant when considering the scope of any preclusive effect to be given to section 1276(a)(1). Assuming *arguendo* that Congress intended that judicial review of actions by the Secretary promulgating national rules be limited to the United States District Court for the District of Columbia, the enumerated sections show that the legislative concern was to maintain a forum for contesting national environmental performance standards. These enumerated sections provide no support for reading section 1276(a)(1) in a manner that divests all other federal courts of jurisdiction to hear a case which does not contest the validity of a national rule, even if the outcome might preclude application of the rule in a particular case.

Case law also supports a narrow construction of the exclusive effect to be given to a provision which purports to limit the availability of judicial review. In *Chrysler Corp., v. E.P.A.*, 600 F.2d 904 (D.C. Cir. 1979), the District of Columbia Circuit was required to consider the scope of section 16(a) in the Noise Control Act of 1972, 42 U.S.C. § 4915(a), which designated the United States Court of Appeals for the District of Columbia Circuit as the exclusive venue for hearing certain challenges. The Court held that it lacked jurisdiction to review the facial validity of enforcement regulations promulgated pursuant to the Act because the

enforcement regulations did not rest on any of the sections designated for exclusive review by the Court. The Court deemed the legislative history of the parallel provisions of the Clean Air Amendments of 1970 instructive, noting that the Congressional purpose for creating a single channel for questioning the validity of regulations was "much more easily fitted to standards and testing [procedures necessary to assure compliance with such standards] than to an enforcement scheme." *Chrysler*, 600 F.2d at 912. *See also Adamo*, 434 U.S. at 284.

Restricting the scope of any preclusive effect which section 1276(a)(1) may impose on obtaining judicial review also ameliorates due process concerns. In his dissent in *Yakus v. United States*[10], Justice Rutledge noted the due process concerns raised by legislation which imposes severe limits on judicial review of regulatory action. His concerns underlie the "nagging ... substantial due process question" identified in *Chrysler*, 600 F.2d at 913, and presented by Petitioners' situation. Faced with a permit block, a mining company is confronted with an unpalatable choice -- risk

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[10] Justice Rutledge indicated that the Emergency Control Act:

> provided a short cut proceeding trimmed almost to the bone of due process, even for wholly civil purposes, ... pared down even further by a short statute of limitations.

321 U.S. 414, 474 (1944) (J. Rutledge, dissenting).

substantial impairment of its business[11] or undertake and complete reclamation work purportedly prompted by third-party misconduct and pay the government an amount equal to outstanding fines and interest purportedly owed by third-party operators, without being afforded an opportunity to test the bona fides of the underlying violations, fines and interest calculations.

Where the question presented for adjudication goes to constitutional issues of the adequacy of notice and hearing, and where the court is not being asked to rule on the merits of any national rule, it is error for the court to conclude that section 1276(a)(1) divests it of jurisdiction to hear the case. In the absence of clear language which requires that section 1276(a)(1) be given such broad preclusive effect, Petitioners can establish jurisdiction to adjudicate their due process rights in a local forum. It is unnecessary to foreclose Petitioners' right to raise a due process challenge in this case because section 1276(a)(1) does not require such a result.[12]

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[11] Like Petitioners, most coal operators are constantly in the process of renewing or revising their permits or seeking new permits for additional operation. *See Coteau*, 53 F.3d at 1489. Delay or denial of these permits could cause serious difficulties in meeting contractual obligations, and the consequences are often irreparable. *Id.*

[12] *Adamo*, 434 U.S. at 290 (J. Stewart, J. Brennan and J. Blackmun dissenting) ("Because the petitioner has not raised any constitutional challenge in this case, there is no occasion to consider what

(continued...)

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and the decision below should be reversed and remanded for further proceedings.

Respectfully submitted,

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[12](...continued)
limits, if any, the Due Process Clause of the Fifth Amendment imposes on the power of Congress to qualify or foreclose judicial review of agency action"); *Harrison v. PPG Industries, Inc.*, 446 U.S. 592, 594 (1980) (J. Powell, concurring) ("I continue to have reservations about the constitutionality of the notice and review preclusion provisions of [the Clean Air Act]").